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Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
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Washington, DC 20002

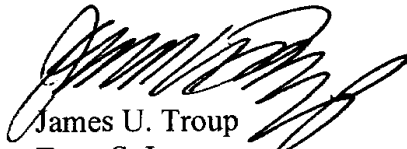
**Re: Comments of NTS Communications, Inc.
WC Docket No. 04-313; CC Docket No. 01-338**

Dear Ms. Dortch:

On behalf of NTS Communications, Inc. ("NTS"), transmitted herewith are an original and four (4) copies of NTS's comments for filing in the above-referenced dockets. Please note that the version being filed herewith has been redacted to remove confidential information pursuant to the modified Protective Order issued by the Commission on September 29, 2004, in this proceeding. NTS's confidential information will be filed under separate cover.

Please acknowledge this submission by date-stamping and returning the extra copy of this filing. Should you have any questions with respect to this matter, please do not hesitate to contact the undersigned at (202) 857-1700.

Respectfully submitted,


James U. Troup
Tony S. Lee

Counsel for NTS Communications, Inc.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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Review of Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local)	
<u>Exchange Carriers</u>)	

COMMENTS OF NTS COMMUNICATIONS

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SUMMARY

NTS Communications, Inc. (“NTS”) is a facilities-based competitive local exchange carrier (“CLEC”) that operates its own facilities in seven markets located in West Texas. NTS utilizes unbundled network elements (“UNEs”) to interconnect its network to SBC’s copper loops obtained as UNEs, and it also utilizes UNE-P as an initial market entry strategy. The regulatory framework that will be adopted by the FCC regarding the availability of UNEs to CLECs must preserve the competitive landscape that has developed to date to prevent disruption of service to customers. It also must assure CLECs access to bottleneck facilities to avoid making it uneconomic to continue to provide service or enter new markets, especially considering the billions of dollars that CLECs have already invested to compete with the incumbent local exchange carriers (“ILECs”).

Any framework developed by the FCC to determine which network elements must be made available to competitors requires a market-based fact-specific analysis for each element. The appropriate framework for such an inquiry should be whether a reasonably efficient CLEC can offer competitively priced telephone, data, and advanced services to the business and residential public in a designated market without cost-based access to a given ILEC network element. If a CLEC would suffer significant technical, operational, or financial impairment without access to a given network element in a particular market, then the FCC must conclude that that element must be offered to CLECs as a UNE under Section 251(c)(3). As part of its inquiry, the FCC should examine whether a network element is available from at least two providers other than the ILEC at a competitive wholesale price.

The relevant market for conducting the Commission’s Section 251(c)(3) impairment analysis should be the market defined by wire center boundaries, because wire centers are well

defined and have been used by the FCC in other proceedings to determine such important issues as universal service funding levels. The wire center boundary approach is specific enough to satisfy the granularity requirement established by the USTA I court.

The Commission may utilize third parties for purposes of fact finding or seeking advice, provided, however, that the FCC makes the ultimate decision regarding which UNEs should be available to CLECs. While it would be best practices for the FCC to undertake the necessary gathering and analysis of the facts itself, given the granularity of the markets required to determine the availability of UNEs, this task is too large for the Commission to conduct on its own. Thus, the FCC should engage the assistance of the state utility commissions, and ask them to report back to the Commission regarding the competitive landscape in each market for each UNE. If a state commission declines to provide such assistance, then the Commission could then directly assume the investigation for that state. A periodic review should be conducted every four years to analyze market changes that have occurred since the initial UNE review.

With regard to intermodal competition, none of the suggested alternatives (e.g., voice over IP, cable television plant, or wireless service) can currently replicate the quality, reliability, or ubiquity of traditional wireline ILEC facilities. They each have shortcomings that cause them to be inappropriate or inapplicable replacements for ILEC UNE offerings. Accordingly, those “alternatives” should not be taken into consideration in determining whether a network element should be made available as a UNE.

It will require a significant amount of time to conduct the appropriate inquiry and analysis to arrive at a list of UNEs that will be made available in each market in the country. In the event that the Court of Appeals vacates the FCC’s transitional UNE rules, the FCC should take actions to exercise its authority in other areas to preserve the status quo until the

Commission can adopt permanent UNE rules. Such actions could include mandating tariff filings that contain network elements at rates no greater than FCC prescribed maximums, and/or transitional national wholesale discounts for resale that maintain the minimum gross margins required for a CLEC to continue to operate.

The UNE proceeding raises the issue of the interplay between Sections 251 and 271. While the unbundling requirements contained in each section are duplicative in some respects, they address two very different market conditions. Section 251 was designed to require access to ILEC UNEs in a non-competitive market, whereas Section 271 was intended to address bare minimum and non-negotiable ILEC unbundling obligations. Thus, Congress intended for the Commission to use its discretion under Section 251(c)(3) to go well beyond those elements specifically set forth in Sections 251 and 271, and establish broad unbundling requirements after appropriate inquiry and investigation to foster competition.

There has been significant controversy regarding the use of UNE-P as a method of promoting competition. However, UNE-P does have application as a valid and viable market entry strategy. In order to address the need to have UNE-P available for new market entrants, and also to encourage competition through facilities-based services, NTS proposes that UNE-P continue to be available as a UNE, but that UNE-P be limited to market entry uses only. Specifically, NTS proposes that the Commission allow a CLEC to use UNE-P to compete for market share until such time as the CLEC has acquired 500 local dial tone lines within a given ILEC end office. After the 500 line threshold is reached, the CLEC would be required to construct collocation facilities and deploy such end office equipment as required to provide service to all of its customers served by that office, and ultimately convert its UNE-P customers to the installed facilities.

NTS provides information to the Commission regarding the markets NTS serves in support of its position that interoffice dark fiber, high capacity loops, and interoffice transport should continue to be available as UNEs during the transition period and also through the FCC's permanent UNE rules. The information demonstrates that the ILEC is the only available provider capable of delivering the network elements NTS needs to provide high quality and advanced telecommunications capabilities to the public. The data further demonstrates that it would be uneconomic for NTS to duplicate the ILEC's facilities given the market size and high costs involved.

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COMMENTS OF NTS COMMUNICATIONS

NTS Communications, Inc. ("NTS"), by its attorneys, hereby submits its comments and proposals related to issues raised by the Commission in the above proceedings.¹

I. INTRODUCTION

Although it has been operating as a common carrier since 1982, NTS is probably not well known to the Commission. In the past NTS has, in an effort to control costs, jointly filed comments with its trade associations and other parties on Commission matters. However, given the potential gravity of Commission rules potentially emanating from this proceeding and the uniqueness of NTS's facilities-based local dial tone and data services business plan and market position,² NTS believes that its input on this matter may prove helpful to the Commission.

The Commission has expressed its preference for the development of final rules that promote facilities-based competition.³ As a facilities-based competitive local exchange carrier ("CLEC"), NTS is especially qualified to comment in this matter and has attempted to address

¹ *Unbundled Access to Network Elements*, Order and Notice of Proposed Rulemaking, WC Docket No. 04-313, FCC 04-179, 2004 FCC LEXIS 4717 (2004) [hereinafter "*NPRM*"].

² For an Overview of NTS's facilities-based CLEC business please see attached Exhibit "A", which is incorporated into these Comments by reference.

³ *NPRM* ¶ 2.

those issues that, if decided incorrectly, will cause substantial harm to the operation of a facilities-based CLEC.

II. AN APPROPRIATE FRAMEWORK TO PROMOTE FACILITIES-BASED COMPETITION

Any framework that is developed by the Commission must balance the needs of investors and consumers of all stripes, both CLEC and incumbent local exchange carrier ("LEC"), be workable under the law and preserve the core of the competitive landscape that has developed to date. The fate of millions of business and residential customers who have made a competitive choice, and the multi-billion dollar economic consequences of such choice, hinge on getting this framework right.

A. An Investigation Into the Facts Of Each Market Is Needed

Given the mandate of *USTA I*, any framework developed by the Commission for determining which bottleneck unbundled network elements ("UNE") must be made available to competitors needs to involve a market-based fact-specific analysis of each UNE at issue.⁴ Under *USTA II*, it is equally clear that the Commission, and not a designated third party, must make the final 47 U.S.C. § 251(c)(3) unbundling decision for each specific UNE.⁵ Given these requirements, it seems obvious that a significant fact-finding investigation be undertaken, on a market-by-market basis, prior to the Commission's long-term determination as to which UNEs must be made available in a given market. Moreover, this long-term determination should be reviewed periodically to determine if market forces have changed the competitive landscape within a given geographic market since the time when the last determination was made.

⁴ *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

⁵ *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

The Commission asked for comment on how its unbundling framework should be changed in light of the guidance provided by the Court in *USTA II*.⁶ The Court in *USTA II* did not reject the Commission's definition of impairment based on operational and entry barriers that make entry into a market uneconomic. Instead, it held that "the Order's interpretation of impairment is an improvement over the Commission's past efforts in that, for the most part, the Commission explicitly and plausibly connects factors to consider in the impairment inquiry to natural monopoly characteristics... or at least connects them (in logic that the ILECS do not seem to contest) to other structural impediments to competitive supply."⁷ However, recognizing that Congress made a distinction between the "necessary" standard in 47 U.S.C. § 251(d)(2)(A) and the "impair" standard in 47 U.S.C. § 251(d)(2)(B), the Court also concluded that the Commission could adopt an impairment standard that "reaches beyond natural monopoly" and the essential facilities doctrine.⁸

The Court did fault the Commission's definition of impairment for not identifying for whom the lack of UNEs would make market entry uneconomic.⁹ The Commission can cure this deficiency by clarifying that UNEs must be made available to overcome operational and entry barriers that make it uneconomic for a reasonably efficient CLEC to enter a market or continue to provide service to a market.

To avoid further uncertainty in the courts, the Commission's analysis should begin with an application of the "necessary" standard "by hewing rather closely to natural monopoly features".¹⁰ This approach will enable the Commission to establish a foundation upon which it

⁶ *NPRM*, ¶ 9.

⁷ *USTA II*, 359 F. 3d at 571-572.

⁸ *Id.* at 572.

⁹ *Id.*

¹⁰ *Id.*

can build its impairment analysis and will produce a list of critical UNEs over which there should be little debate. Then the Commission can add UNEs to that list after completing its market specific analysis of operational and entry barriers that make it uneconomic for a reasonably efficient CLEC to enter a market or continue to provide service in a market.

In applying the "necessary" standard, the Commission's determinations under § 251(c)(3) must at a minimum make UNEs available for essential bottleneck facilities that a CLEC cannot reasonably reproduce and that therefore are covered by the essential facilities doctrine.¹¹ During MCI's antitrust lawsuit against AT&T, the Court concluded that most of the ILEC's local distribution facilities satisfy the criteria of "essential facilities".

The facilities in question met the criteria of "essential facilities" in that MCI could not duplicate Bell's local facilities. Given present technology, local telephone service is generally regarded as a natural monopoly and is regulated as such. It would not be economically feasible for MCI to duplicate Bell's local distribution facilities (involving millions of miles of cable and line to individual homes and businesses).¹²

When a bottleneck facility necessary for a facilities-based CLEC to operate is found in a given market, it is absolutely imperative that the Commission order this facility be made available to competitors under a cost-based pricing scenario. Without such a requirement, the ILEC in control of the bottleneck facility has no incentive to make the facility available to competitors at all – much less at a cost-based price.

Failure to mandate cost-based availability of such facilities to competitors results in either (1) the ILEC setting the price so high as to preclude economic market entry,¹³ or (2) the ILEC

¹¹ *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1133 (7th Cir. 1983).

¹² *Id.*

¹³ *Sprint Communications Co. v. FCC*, 274 F.3d 549, 555(D.C. Cir. 2001) (holding that, because the Communications Act aims to stimulate competition, the FCC's public interest analysis requires the consideration of potential price squeezes).

simply denying access to this facility altogether.¹⁴ Under either scenario, economic barriers to entry become so high that no competition, facilities or non-facilities, is able to succeed. Sadly, with respect to the local dial tone and data markets that NTS serves on a facilities basis,¹⁵ the reality is that the ILEC continues to exert tight-fisted monopoly control over most, if not all, of the bottleneck facilities which enable facilities-based competitors to offer a choice to the public.

Given the foregoing legal and factual realities, NTS suggests that an appropriate framework on a going forward basis would be for the Commission to commence a fact-specific inquiry into each market asking a fundamental question. That is, "Can a reasonably efficient CLEC offer competitively priced telephone, data and advanced services to the business and residential public in a designated wire center without cost-based access to a given ILEC network element?" If the answer to this question is that in the absence of a given UNE competitors would suffer significant¹⁶ technical, operational, or financial impairment¹⁷ without access to it, then the Commission must conclude that the element shall be offered to CLECs under Section 251(c)(3) with respect to the market in question.

In conducting the foregoing factual analysis, the Commission should foremost examine whether or not a CLEC can purchase a given network element in a stated market from at least two providers other than the ILEC at a competitive wholesale price. If so, then it should not be necessary for the ILEC to offer that network element to CLECs under Section 251(c)(3). This

¹⁴ Unfortunately, both of these scenarios have been observed by NTS in the industry-wide process of trying to reach negotiated agreements with SBC since the Commission's call that the parties come together to reach a resolution to the current situation.

¹⁵ As noted in the attached Exhibit "A", these markets are Abilene, Amarillo, Lubbock, Midland, Odessa, Pampa, Plainview and Wichita Falls, Texas.

¹⁶ As used in this context, "significant" is properly defined as "of a noticeably or measurably large amount". See *Merriam-Webster's Collegiate Dictionary* 1159 (11th ed. 2003).

¹⁷ NTS points out that in its experience, a reasonably efficient facilities-based CLEC must be able to generate operating gross margins of at least forty percent in order to survive and continue to operate.

result obtains because free market dynamics should act to set an appropriate wholesale price for a given network element with a total of three or more providers (including the ILEC) competing for business. This would not be the case with only the ILEC plus one additional wholesale provider because a duopoly is simply not sufficiently competitive to allow market dynamics to set truly competitive prices for a given network element.¹⁸

B. The Commission's Rules Should Encourage Creation of Wholesale UNE Markets

Some may argue that requiring Section 251(c)(3) unbundling effectively prevents the creation of competitive wholesale markets because it sets an artificially low wholesale price against which competition must take place. NTS's experience is that this argument simply does not hold water in the real world for the vast majority of UNEs. The reality is that CLECs of all types (including NTS) would like nothing more than to escape their reliance on their primary competitor, the ILEC, to provide service to their customers. Such an escape from ILEC reliance comes with the added benefit of avoiding the regulatory uncertainty that has dogged the industry since its inception.

The undeniable law of market dynamics is that, given time, where there is demand, supply is sure to follow.¹⁹ This basic law of market forces, however, does not apply when, as is the case with UNEs, there is only one supplier of an input necessary to provide a product (or in this case, a service) to the public.²⁰ In markets characterized by monopolies (like the wholesale UNE market) excess profit is realized by the monopoly provider and purchasers receive a lower

¹⁸ *Proposed Final Judgment and Competitive Impact Statement; United States of America v. AT&T Corp. and McCaw Cellular Communications, Inc.*, 59 Fed. Reg. 44158 (1994) (Department of Justice finding that duopoly markets evidence "an absence of significant price competition").

¹⁹ Tom Gorman, *The Complete Idiot's Guide To Economics*, (2003).

²⁰ *Id.* at 130.

quantity of the product than would be the case in a competitive market.²¹ Thus, the Commission's rules should strongly encourage development of robustly competitive wholesale markets for UNEs.

NTS has been in talks with several resale/UNE-P based CLECs to offer UNEs such as mass market switching, loop capacity, and end-user broadband services on a wholesale basis in its facilities-based markets. Not only is NTS willing to lease its facilities-based network elements to other CLECs, it is anxious to do so because the additional revenue from these wholesale purchasers works to significantly help NTS recover the sunk costs it has already incurred to provide services to its own customers. Were the Commission in this proceeding to develop rules which effectively eliminated the ability of these resale/UNE-P carriers to survive, demand for the wholesale supply NTS is attempting to deliver would surely dry up and, thus, no wholesale markets will develop to compete with the ILEC. Conversely, if the Commission develops rules in this proceeding that have the effect of preventing a facilities-based CLEC like NTS from meeting this requested demand, no wholesale markets will develop to compete with the ILEC. Either way, the ILEC is left with bottleneck control of essential network elements and facilities-based competition goes nowhere - forever. The Commission must not allow this result to occur.

C. What is a "Market" For Section 251 Determinations?

There is no need to "reinvent the wheel" in determining what a relevant "market" should be in conducting an impairment analysis under Section 251. A "market" for impairment analysis purposes should be defined as the "wire center for a given metropolitan or rural area".

²¹ *Id.* at 131.

Wire centers are "common or normal demarcations for provision of service."²² Wire centers are well defined and have been in use for many years to determine such important issues as universal service fund disaggregation and pricing flexibility for interstate access charges. See e.g., 47 C.F.R. §§ 54.315, 69.709. Moreover, a wire center centric approach should be specific enough to satisfy the *USTA I* granularity requirement.

Just as important, it is a rational way to look at local markets because every local access line that can be served within a given local exchange area is linked to the public switched telephone network via one or more ILEC end offices serving a given local exchange. These end offices or end office/tandems can (and do today) serve as the most logical interconnection points at which facilities-based CLECs may establish their collocations. It is through these very collocations that facilities-based CLECs gain access to those network elements necessary to offer voice, data, video and advanced services to the public.

Moreover, a wire center definition of "market" is the way that potential facilities-based CLECs analyze the feasibility of constructing competing plant and installing competitive equipment. This is the case because, for example, economic conditions are generally very similar across the entirety of a given wire center, access line counts are readily available, marketplace demographics are normally easily obtainable, there exists a community of interest within the area, a wire center is often served by common media outlets, and existing service providers, competitive and incumbent, are clearly defined across the area encompassed by the wire center.

Such a definition of "market" is also a good idea because a wire center is small enough that it will aid in the development of facilities-based competitive choices for as many Americans as possible. Using a more expansive definition of "market" (such as an MSA or RSA), one

²² *MCI Communications Corp. v. AT&T*, 708 F.2d at 1146.

could very well envision a scenario in which a smaller non-competitive wire center sits adjacent to a robustly competitive wire center and the smaller wire center gets caught up in a “non-impairment” finding for a “market” definition that encompassed both the large and small wire centers. In allowing density zones for pricing interstate access services and federal universal service fund support, the Commission has determined that wire centers within the same study area should be treated as different markets. A “market” definition more expansive than the wire center would in all likelihood doom consumers in the smaller wire center to a perpetual lack of choice for local dial tone, data and other advanced services. This outcome would run counter to the whole purpose and intent of the 1996 Act.

Defining “market” as a wire center is also helpful in tracking the future course of competition. ILECs and CLECs have become accustomed to providing data to both state and federal regulatory agencies for a given wire center. Thus, the forward looking costs of monitoring competitive developments on a wire center basis should be minimal. Existing reporting systems are already in place, or could be easily developed, to report items such as line counts, participation in low income programs, capital plant costs, route and loop deployment, service disruptions, broadband deployment, competitive analysis, and the like.

Moreover, a wire center definition of “market” enables both small and large CLECs to compete because initial capital costs to build competing facilities (while large), are not so onerous that competition will be frozen out. Such a definition should have the added benefit of bringing more competition to smaller wire centers which to date, have been mostly overlooked due to lower economies of scale. Surely it was not contemplated by the drafters of the 1996 Act that the benefits flowing from competition should be limited to those Americans living near only the largest wire centers in the country.

D. Who Should Conduct The Factual Investigation For Each Market?

In the Triennial Review Order,²³ the Commission delegated to the various state commissions the effective authority to determine which UNEs should be available under Section 251(c)(3). Given the court's holding in *USTA II*, the Commission may not delegate its decision-making to the states. However, just as clearly, the *USTA II* court indicated that the Commission may look to a third party for "fact finding" or for "advice giving" provided that the Commission makes the final decision.²⁴ Thus, it would seem permissible for the Commission to utilize the informed input of outside third parties in gathering facts and in getting advice to inform its decisions in this matter.

While it would probably be a "best practice" for the Commission to undertake the entirety of the required factual gatherings itself, given the Commission's stretched resources, the examination of every UNE in every market in the country would appear to be too large a job for the Commission to conduct solely on its own. Moreover, such an approach would likely take longer than is wise given the urgent need for regulatory certainty in the competitive telecommunications markets generally. It was, therefore, logical for the Commission to request the assistance of the state utility commissions. *NPRM*, ¶15. The FCC should ask the state commissions to report back to the Commission regarding what the competitive facts are in each market for each UNE. Such factual reports could also presumably contain a recommendation (if a state commission wished to give it) as to whether or not a specified UNE in a given market was sufficiently competitive to warrant a removal from unbundling requirements under Section

²³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003); Errata, 18 FCC Rcd 19020 (2003) ("*TRO*").

²⁴ *USTA II*, 359 F.3d at 566-567.

251(c)(3). The Commission would be free to give such weight to a state's recommendation (if given) as it deemed appropriate in the prudent exercise of its regulatory authority.

In the event that a state commission did not wish to undertake the requested factual assessments, then the Commission could directly assume the fact gathering relevant to that state. NTS's view is that the vast majority, if not all, state commissions would welcome such a request from the Commission and would do their best to accommodate the Commission's fact gathering needs in this regard. State commissions engage in assessing the facts of competition on a regular basis.²⁵ In any event, this initial fact gathering process would help establish a baseline of available UNEs by market from which Commission determinations could be made.

In order to address changes in market conditions over time, it seems necessary for the Commission to conduct additional factual reviews on a regular basis. These additional reviews should be conducted every four years,²⁶ and could be conducted by the Commission using its own resources, or the Commission could enlist the aide of state commissions. Effectively, these subsequent reviews would analyze changes from the baseline Section 251(c)(3) UNE list on a market-by-market basis and would serve as a platform to add or subtract necessary UNEs as competitive conditions warrant.

E. Some Thoughts About Intermodal Competition

It is understood that the Commission should examine the effect of intermodal competition. However, some have suggested that Voice over Internet Protocol ("VOIP") using cable television ("CATV") plant or cell phones are an effective substitute for wireline voice and/or data services. This position ignores the fact that neither CATV VOIP nor cell phones can

²⁵ For example, the Texas Public Utility Commission engages in regular fact-finding regarding competition within the state and issues a bi-annual Scope of Competition Report to the Texas Legislature.

²⁶ Anything less than three years is too short a time to see any significant market changes, and any period exceeding five years would not capture market dynamics rapidly enough to reflect reality.

come close to replicating the quality, reliability, nor ubiquity of the traditional wireline ILEC embedded plant. It is common knowledge that cell phones regularly drop calls and have distorted quality in many areas – both rural and urban. The same criticism simply cannot be leveled at wireline phone service.

With respect to data services, cell phones cannot achieve anything close to the 20+ Mbs capacity of current DSL technology (ADSL2+) and cable modems cannot guarantee any stated bandwidth. This arises from cable modem use of shared access Ethernet technology. DSL can and does guarantee bandwidth to customers. CATV plant is also not as ubiquitous as many commentators might suggest given build-out requirements that generally only require plant to be built-out where density equals or exceeds 40 homes per 1 mile of cable. The more rural an area is, the more of an issue ubiquitous service becomes. Conversely, in the name of universal service, wireline telephone plant has been built to every nook and cranny of the country, regardless of population density or the number of establishments passed.

Moreover, neither VOIP over CATV plant nor cell phones can currently replace the role of 911 emergency assistance or CALEA compliance now offered by wireline telephone service. Recent experience also demonstrates that CATV VOIP and cell phones have either wireless interference issues or are unable to continue to provide service without commercial electric power during a terrorist attack or natural disaster. One could argue that the lack of CALEA compliance when using VOIP presents such a significant national security concern in the “Post 911 World” that this issue should properly occupy the minds of government officials at the highest levels until a final and impregnable solution is reached. NTS does not wish to belabor this point, but it does note that VOIP security is an issue that needs to be resolved before the widespread use of VOIP is allowed to compromise the safety of the American public.

Additionally, most large-scale VOIP deployments are targeted at a single market element – the residential consumer. This technology is simply “not ready for prime time” when it comes to serving even small business customers, not only for reasons stemming from coverage areas, but also because of the complexity arising from the needs of business users. These requirements, such as the need for PRI interfaces, are discussed more thoroughly in Section V of these comments. There will come a day when VOIP does play a major role in serving business customers, but neither the technology nor the industry is there yet.

F. The Status Quo Must Be Maintained in the Interim Period if the FCC’s Transitional UNE Rules are Vacated

Obviously, it will take a significant amount of time to arrive at a list of Section 251(c)(3) network elements for each market in the country. The FCC’s transitional UNE rules are designed to preserve the benefits of competition offered by today’s CLECs until a final list of market-based UNEs is determined by the Commission.²⁷ However, several ILECs have asked the Court of Appeals to vacate those transitional UNE rules. Should the Court vacate the transitional UNE rules, the Commission should exercise other areas of its authority to preserve the status quo until it has had sufficient time to adopt permanent UNE rules.

For example, the Commission could exercise its authority under 47 U.S.C. § 203 to require ILECs to offer through their tariffs replacements for network elements, such as dark fiber, that ILECs have refused to include in their tariffs. Pursuant to its authority under 47 U.S.C. §§ 201 and 205, the Commission could prescribe maximum rates for those transitional UNE replacement services based on TELRIC. Similar transitional rate structures have been upheld on appeal to prevent market disruptions pending broader reform.²⁸

²⁷ *NPRM*, ¶ 21.

²⁸ *CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002)

The Commission could also exercise its authority under 47 U.S.C. § 201 and 251(c)(4) and (d) to prescribe a transitional national wholesale discount for resale. The Supreme Court held that it was the resale provisions of the 1996 Act that were intended to maximize sharing of ILEC networks.²⁹ The wholesale discount should be set at a level that maintains the gross margins of at least forty percent needed to sustain competition during the short time period that the Commission requires to complete its adoption of permanent UNE rules. To maintain this critical gross margin during the transition period, the Commission could temporarily permit CLECs relying on such resale to bill terminating access charges to interexchange carriers (“IXCs”) in lieu of the ILECs, and preclude the ILECs from assessing originating access charges on such CLECs.

III. THE INTERPLAY BETWEEN SECTIONS 251 AND 271

Although the unbundling requirements contained in each section are duplicative in some ways, Sections 251 and 271 were incorporated into the 1996 Act to address two very distinct market conditions – non-competitive and competitive.

Section 251, especially Section 251(c)(3), was designed to require access to ILEC UNEs in non-competitive markets. It was enacted to pry open bottleneck facilities owned by monopolistic providers who would be forced to let others use these very bottleneck facilities to compete against the monopolist who owned the facility in the first place. The monopolist certainly has no incentive to give up control of its market power and, in fact, has every reason to preserve its market position. Thus, it seems clear that Congress left broad discretion to the Commission in interpreting Section 251(c)(3) for the purpose of opening up access to these bottleneck facilities after the Commission carefully examined precisely what would be required to spur competition. This discretion was required because it was not readily apparent at the time

²⁹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 430 (1999).

the statute was written exactly what specific network elements would be required in order to create competition in a theretofore single-provider marketplace. Unfortunately, it has been the exercise of this broad discretionary authority that has come under such remarkable criticism by the courts.

In contrast, Section 271 contemplated something different. Congress incorporated very precise unbundling requirements into Section 271 because its provisions were intended to address bare minimum and non-negotiable ILEC unbundling obligations. These obligations (as well as those expressly set forth in Section 251) exist on a perpetual basis regardless of the competitive landscape of a given market. Accordingly, the discretion that Congress so broadly and specifically conferred upon the Commission in determining Section 251 unbundling requirements was generally not as broadly granted under Section 271.

Thus, a fair reading of the entirety of both sections seems to indicate that Congress intended for the Commission to use its discretion under Section 251(c)(3) to go well beyond those elements specifically enumerated in Sections 251 and 271. After competition (preferably facilities-based competition) has a chance to take root, become firmly established and self-sustaining, the broad unbundling requirements of Section 251(c)(3) might gradually be phased out as no longer necessary to support competition. Thus, after the additional unbundling requirements of Section 251(c)(3) had run their course, the industry would be left with the bare minimum requirements stated in both Sections 251 and 271.

A primary question before the Commission in this proceeding is whether or not facilities-based competition has become so firmly entrenched that it can survive in the absence of Section 251(c)(3) unbundling obligations. This determination can only be made after a factual investigation of each UNE in each market. NTS is certain that the answer is a definitive “no” in

its own facilities-based markets, and suspects that this is the case for most UNEs in the vast majority of markets that the Commission will examine.

Unbundling requirements simply have not been given sufficient time to create the kind of robust facilities-based competition that is necessary before the industry moves beyond the permissive mandate of Section 251(c)(3). This result is not particularly surprising given eight years of court challenges, regulatory uncertainty, and various tactics by the ILEC community to roll back attempted competition at every turn. Even in a perfect regulatory world allowing a guaranteed rate of return, unlimited access to capital, and no competition whatsoever, it took the ILECs (according to their TV commercials) more than one hundred twenty five years to build out their networks. To suggest (in a world filled with regulatory uncertainty, an absence of guaranteed return on investment, and combative ILEC suppliers) that robust competition could become self-sufficient and sustainable without Commission assistance in a mere eight years is simply expecting too much of any new industry.

IV. A PROPOSAL RELATING TO MASS MARKET SWITCHING A/K/A UNE-P

Given the contentious history of the UNE-P method of fostering competition, NTS has thought that a compromise on this issue may be possible if the use of UNE-P were somehow limited. It is in the spirit of reaching such a resolution that NTS respectfully submits the following proposal for consideration by the Commission.

A. NTS Has Historically Used Total Service Resale and UNE-P as Market Entry Methods

NTS has used both “Total Service Resale” (“TSR”) and what is generally called “UNE-P” in Southwestern Bell Telephone’s (“SBC”) Texas territories as a limited market entry

strategy.³⁰ The theory behind this practice is that once a “critical mass” of customers is using NTS as their chosen local dial tone carrier within a given market, NTS can then afford to invest in facilities deployment within the market in question with some degree of confidence that capital outlays will not be wasted. After achieving this “critical mass” of customers in a market, NTS has moved to aggressively deploy its own facilities based services, and then convert its previously established customer base to these newly deployed facilities. To date, this strategy has for the most part been successful.

B. Total Service Resale Is No Longer an Effective Competitive Strategy

The initial problem with TSR has always been that the discounts offered by the ILECs have been so small that a long term business case using this method is not economic.³¹ However, it was acceptable as a limited use method for initial market entry – at least until the ILEC received long distance approval. Now, for the reasons stated below, this mechanism is simply no longer feasible even as a market entry strategy.

In Texas, it is a marketplace reality that it is necessary to bundle, at a minimum, long distance with local dial tone services as a package in order to compete for both business and residential customers. Failure to do so renders any service offered non-competitive in the extreme. Due to this bundling requirement, TSR is not a cost effective market entry strategy because the TSR carrier is assessed originating long distance access charges by the ILEC, and the TSR carrier is unable to collect access charges from other IXC's for terminating access. Because of these factors, any service offering using TSR is “blown away” by competing ILEC

³⁰ NTS operates as a CLEC only in Texas and, thus, is only able to use Texas examples. We believe, however, that these examples are generally applicable to other states as well.

³¹ In Texas, the resale discount has been 21.6% since the rate was first established quite a few years ago. It has generally been necessary to pass at least a 5% to 10% savings along to the customer in order to win business. This leaves the TSR carrier with a gross margin ranging from 11.6% to 15.6%; far short of what is necessary to operate a surviving CLEC.

offerings. This occurs because the carrier using TSR has “all-in” out of pocket long distance access charge costs for intrastate calls of approximately \$.06 per minute of use.³² Moreover, the TSR carrier receives no terminating compensation in the nature of terminating access charges – those fees instead going to the ILEC that resold the local service.

In contrast to the TSR carrier, a competing ILEC (in this case, SBC) never pays access charges for originating long distance calls.³³ Then, with a Texas statewide local dial tone market share in excess of eighty two percent,³⁴ SBC statistically knows that in at least³⁵ eighty two out of one hundred instances it will pay no intrastate terminating access charges. Even if SBC does have to pay such charges to its customer’s chosen long distance carrier for terminating the call, SBC knows that it will collect these same access charges from that carrier on the terminating end of the call. Thus, the “all-in” out of pocket long distance access charge cost to SBC to provide intrastate long distance service to its customers using bundled services is approximately \$0.0054 cents per minute.³⁶ This amounts to less than one-tenth of the intrastate costs incurred by a similarly situated TSR carrier. SBC also, unlike the TSR carrier, receives terminating access revenues for calls terminating to its local dial tone customer - further increasing its margins.

³² In Texas, intrastate originating access charges assessed by SBC are in excess of \$0.03 per minute, or about 10 times the cost of interstate access charges. As such, the costs to an interexchange carrier to originate and terminate an intrastate call in Texas approximate \$.06 per minute. For purposes of simplicity, we have not calculated the effect of interstate calling, but note that for calls within SBC’s 14 state territory the effects noted herein should be the same.

³³ SBC does not allow a Texas customer to choose SBC as its long distance carrier unless SBC is also the local dial tone provider of record.

³⁴ Public Utility Commission of Texas, *Report to the 78th Texas Legislature, Scope of Competition in Telecommunications Markets of Texas – December 2002 Update* (August 2003).

³⁵ Actual instances are higher than stated insofar as SBC is not required to pay access charges for TSR lines resold by it because that would amount to SBC paying itself. TSR lines accounted for between one and eight percent of total CLEC lines in Texas, depending on market area. *Supra*, n.31.

³⁶ Calculated as follows: Originating Access Cost: \$0.00 per minute of use; Terminating Access Cost: 100% less 82% local dial tone statewide market share equals 18%, multiplied by an intrastate rate of \$0.03 per minute of use equals \$0.0054 cents per minute of use.

As one can readily see from the above analysis, it is simply impossible for a CLEC attempting to use TSR to build a competitive service offering. Such a strategy is wholly uneconomic and can only result in the bankruptcy of any CLEC attempting it.³⁷ Tragically, this strategy, which has been wholly undermined due to the use of monopoly market power by the ILECs, is directly and explicitly recognized by the 1996 Act as a legitimate competitive method.³⁸ To say that the purposes of the 1996 Act have been frustrated in this regard is a gross understatement.

C. UNE-P Has Emerged As An Effective Market Entry Strategy

In contrast to the problems incurred with respect to TSR, a UNE-P strategy allows a CLEC to compete in an effective way with the ILEC. This is because UNE-P puts the CLEC in almost the same position with respect to long distance access charges as that enjoyed by the ILEC. We say “almost the same position” because the ILEC continues to have the market power advantage of not having to pay access charges to itself; which results in the ILEC’s avoidance of all long distance access charges in those instances where it is the local dial tone provider on both ends of the call. As noted above, with respect to SBC in Texas, this amounts to the avoidance of about eighty-two percent of all intrastate access charges. Notwithstanding this fact, CLECs employing a UNE-P market strategy are able to avoid originating long distance access charges and can charge terminating access charges in the same manner as the ILEC. Thus, CLECs are on a much more equal footing with the ILEC than is the case using a TSR strategy.

³⁷ In the past 12 months alone, NTS has lost approximately 34% of its TSR customer base (these are customers outside of NTS’s facilities-based markets). This loss is the result of SBC’s use of its market power to offer rates to retail long distance customers below NTS’s actual costs to provide similar service. During this same period, the number of NTS’s facilities-based lines has grown significantly.

³⁸ 47 U.S.C. §§ 251(b)(1), 251(c)(4), 252(d)(3), and 271(c)(B)(xiv).

D. Continue To Allow Use of UNE-P – But Limit Its Use To Market Entry

Understanding the Commission's preference for facilities-based competition, it has been widely predicted that the Commission may well dismantle UNE-P as a competitive mechanism. This would be a mistake at least insofar as UNE-P is used merely as a market entry strategy. An appropriate course of action with respect to UNE-P should balance the need for facilities-based competition with the need for CLECs to have an effective mechanism to enter a market in a reasonably cost effective manner. UNE-P remains necessary to "jump start" competition in markets. NTS suggests that the Commission allow UNE-P, but limit its use to market entry alone.

Accordingly, NTS proposes that the Commission allow CLECs to use the UNE-P mechanism to compete for market share until such time as a CLEC has acquired approximately 500 local dial tone lines within a given ILEC end office.³⁹ Upon reaching this threshold, the CLEC would then be required to commence the construction of collocation facilities and deploy therein such end office equipment as is required to provide service to all of its customers served via the end office in question. Interoffice or other interconnection transport facilities would be required to be leased as a UNE from the ILEC or a third party and appropriate interconnection trunks would need to be arranged in cooperation with the ILEC. Moreover, the CLEC would be required to arrange for switching using its own switch(es) or those of a non-ILEC third party.

When all necessary owned and/or leased CLEC facilities are in place, the CLEC would then be required to order from the ILEC the conversion of all UNE-P customers to the CLEC's newly established facilities using established "cut-over" procedures. Assuming active ILEC

³⁹ This number of lines is based on NTS's internal analysis of when it becomes possible (under current rules and rates) for a facilities-based CLEC to recoup the capital costs of deployed equipment and collocation payments to the ILEC in approximately fifty-four months. For a detailed breakdown of this analysis see the attached Exhibit "B" (filed under seal pursuant to the Commission's Protective Order issued in this proceeding).

cooperation is assured by Commission rule, final “cut-over” of all customers in an end office could be required within one-hundred sixty days from completion of collocation facilities. After such date, the CLEC would no longer have the right to provision customers out of the end office in question using the UNE-P mechanism.

NTS believes that the foregoing proposal strikes an important and appropriate balance between the competing interests involved. It encourages CLECs to enter new markets, while at the same time allowing them to do so without huge and incredibly risky upfront investments of capital. It also removes UNE-P as a long term issue for the ILEC community. Most important, it requires the deployment of new facilities by CLECs, and further, should aid in the development of new wholesale markets from which CLECs can purchase network elements. Thus, NTS would encourage the Commission to adopt rules implementing the above proposal.

V. GRANULAR INFORMATION CONCERNING NTS’S FACILITIES-BASED MARKETS

A. Large Markets - Amarillo and Lubbock, Texas

These two markets consist of approximately 145,000 access lines each. The number of SBC end offices and the corresponding NTS network architecture is somewhat different in each market, depending on market specific geographic characteristics.

NTS has deployed a Lucent 5ESS switching platform in each market to serve the voice needs of its customers. The Amarillo switch is engineered to accommodate approximately 15,000 lines and the Lubbock switch is designed to provide service to roughly 40,000 lines.

In Amarillo, NTS is physically collocated in the SBC Drake, Fleetwood, Evergreen, and Diamond end offices. The NTS Amarillo switch interfaces with the Amarillo SBC network utilizing NTS constructed and owned fiber optic facilities. Interconnection for the exchange of local traffic, network signaling and the like occurs via end office trunking at each SBC end

office. Interoffice transmission between the NTS POP and the Evergreen and Diamond end offices is accomplished using hi-capacity DS-3 interoffice facilities. Interconnection between the Drake and Fleetwood offices is accomplished using SBC dark fiber provided as a UNE and made into an OC-48 collapsed ring architecture using NTS electronics. NTS estimates that these dark fiber facilities, if they had to be constructed, would cost NTS approximately \$506,079 to replicate.⁴⁰ Alternatively, under an OC-N tariff pricing scenario, this capacity would cost approximately \$20,000 per month.⁴¹ Under our existing interconnection agreement utilizing TELRIC pricing, this dark fiber facility costs NTS approximately \$500.00 per month to lease.⁴²

In Lubbock, Texas, NTS is physically collocated in the SBC Porter-Sherwood, Swift, Frankford, and Parkview end offices. The NTS Lubbock switch interfaces with the SBC network via fiber facilities constructed between NTS's Lubbock POP and the SBC Porter Sherwood end office. Interoffice transmission between the SBC Porter Sherwood office to the Swift, Frankford and Parkview end offices is accomplished using SBC UNE dark fiber facilities. The link between the Parkview end office and NTS's Lubbock POP (which completes the SONET OC-48 ring architecture) is leased from a third party. Interconnection for the exchange of local traffic, network signaling and the like occurs via end office trunking at each SBC end office.

NTS estimates that the Lubbock dark fiber facilities leased as UNEs from SBC, if they had to be constructed, would cost NTS approximately \$1,518,237 to replicate.⁴³ Alternatively, under an OC-N tariff pricing scenario, this capacity would cost approximately \$60,000 per

⁴⁰ Estimate based on average interoffice mileage between SBC end offices where NTS currently leases dark fiber as a UNE of 42,173 feet and construction costs of \$12.00 per foot. These costs do not include deployed electronics.

⁴¹ Estimate based on linear OC-48 capacity purchased from SBC.

⁴² Cost is estimated based on TELRIC dark fiber pricing with a reference facility of 42,173 feet in length.

⁴³ Estimate. See n.40, *supra*.

month.⁴⁴ Moreover, such a linearly architected tariff replacement would not be able to duplicate the functionality of the ring configuration currently enjoyed by NTS's customers. Under our existing interconnection agreement utilizing TELRIC pricing, these Lubbock dark fiber facilities cost NTS approximately \$1,500.00 per month to lease.⁴⁵

Alternative Providers - To NTS's knowledge, there exists one additional switch-based carrier operating in the Lubbock and Amarillo markets. NTS is not entirely aware of this providers' network configuration, but is quite sure that it does not have any end user loops, databases, interoffice facilities, or interconnection facilities that can be shared or leased. SBC is the only available provider capable of delivering the network elements which NTS needs to use in these markets to provide quality dial tone products and advanced telecommunications capabilities to the public.

Intermodal Competitors - To NTS's knowledge, there are at least three mobile wireless providers in these markets. None of these providers offers products comparable to traditional wireline telephone services to business or residential customers - such as DS-1/DS-3 service, PRI service, DID services, hunting services, tie lines, enhanced 911 services, or unlimited local calling within the exchange. Almost all of NTS's business customers and the vast majority of NTS's residential customers consider these functions to be required features. Wireless providers in these markets offer no data options that are comparable to the broadband data services offered by the wireline providers.⁴⁶

The sole incumbent cable television operator in each market offers high-speed internet access, but does not guarantee speeds and does not offer ubiquitous service throughout the

⁴⁴ Estimate. See n.41, *supra*.

⁴⁵ Estimate. See n.42, *supra*.

⁴⁶ Typical mobile phone data services are limited to 28Kbs to 128Kbs transfer rates and these data plans are two to three times the cost of wireline options.

exchange. Having originally built its plant to serve primarily residential video customers, it is incapable of offering service to key business districts. The cable operator has no price competition for its video services except from national satellite providers.

B. Medium Sized Markets - Abilene, Midland, Odessa, and Wichita Falls, Texas.

These markets consist of approximately 75,000 access lines each. The number of SBC end offices and the corresponding NTS network architecture is somewhat different in each market, depending on market specific geographic characteristics.

In Abilene, Texas, NTS has deployed a Lucent 5ESS switching platform at NTS's Abilene POP and is physically collocated in the SBC Orchard and Owen end offices. Transmission between the NTS Abilene POP and the SBC Owen office is accomplished using NTS constructed fiber optical facilities. Interconnection for the exchange of local traffic, network signaling, and the like occurs at each SBC end office. Interoffice transmission between the SBC Orchard and Owen offices is accomplished using SBC dark fiber leased as a TELRIC UNE and made into an OC-48 collapsed ring architecture using NTS electronics. NTS estimates that these dark fiber facilities, if they had to be constructed, would cost NTS approximately \$506,079 to replicate.⁴⁷ Alternatively, under an OC-N tariff pricing scenario, this capacity would cost approximately \$20,000 per month.⁴⁸ Current TELRIC based dark fiber pricing has allowed NTS to lease these facilities for approximately \$500.00 per month.⁴⁹

In Midland and Odessa, Texas, NTS has effectively combined these two separate exchanges, along with the SBC Terminal exchange, to form one larger, more logical, and more economical exchange. NTS performs switching functionality in this newly NTS created "mega-

⁴⁷ Estimate. See n.40, *supra*.

⁴⁸ Estimate. See n.41, *supra*.

⁴⁹ Estimate. See n.42, *supra*.

exchange” via its Lubbock deployed (host) Lucent 5ESS switch. NTS is physically collocated in the SBC Midland Mutual, Midland Oxford, SBC Terminal, Odessa Emerson, and Odessa Lincoln end offices. Each end office is connected back to the Lubbock host switch via diverse intercity long haul facilities at minimal additional cost.⁵⁰ Interconnection for the exchange of local traffic, network signaling, and the like occurs at each end office. Interoffice transmission between the SBC Midland, Odessa and Terminal end offices is accomplished using SBC dark fiber leased as a TELRIC UNEs and made into a diverse routed SONET OC-48 ring architecture using NTS electronics. NTS estimates that the dark fiber facilities between each end office in these markets, if they had to be constructed, would cost NTS approximately \$2,530,395 to replicate.⁵¹ Alternatively, under an OC-N tariff pricing scenario, this capacity would cost approximately \$100,000 per month.⁵² Current TELRIC based dark fiber pricing has allowed NTS to lease these facilities for approximately \$2,500.00 per month.⁵³

In Wichita Falls, Texas, NTS has deployed a Lucent 5ESS switching platform at NTS’s Wichita Falls POP and is physically collocated in the SBC Lamar, Call Field, and Tank Farm/Airport end offices. Transmission between the NTS Wichita Falls POP and the SBC Lamar end office is accomplished using NTS constructed OC-48 facilities. Interconnection for the exchange of local traffic, network signaling, and the like occurs at each end office via SONET OC-48 fiber optic facilities. Two of these links (Lamar to Call Field and Call Field to Tank Farm/Airport) are leased as a TELRIC UNEs and “lit” using NTS electronics. The link between Lamar to Call Field was constructed by NTS acting in partnership with several

⁵⁰ Current open market based pricing for intercity long haul facilities is approximately \$0.0005 cents per DS-0 mile (\$0.336 per DS-3 mile, or \$16.128 per OC-48 mile) when purchased at the OC-48 level.

⁵¹ Estimate. See n.41, *supra*.

⁵² Estimate. See n.42, *supra*.

⁵³ Estimate. See n.43, *supra*.

independent local telephone companies. Thus, interoffice transmission between each Wichita Falls end office is accomplished using a combination of SBC dark fiber leased as UNEs and NTS constructed facilities. Each of these facilities are interconnected at each SBC end office and then made into a SONET OC-48 redundant ring architecture. NTS estimates that the Wichita Falls dark fiber facilities currently being leased from SBC as a TELRIC UNE, if they had to be constructed, would cost NTS approximately \$1,012,158 to replicate.⁵⁴ Alternatively, under an OC-N tariff pricing scenario, this capacity would cost approximately \$40,000 per month.⁵⁵ Current TELRIC based dark fiber pricing has allowed NTS to lease these facilities for approximately \$1,000.00 per month.⁵⁶

Alternative Providers - To NTS's knowledge, there are no other facilities-based carriers operating within any of its medium sized markets.⁵⁷ SBC is the only available provider capable of delivering the network elements which NTS needs to use in these markets to provide quality dial tone products and advanced telecommunications capabilities to the public.

Intermodal Competitors – To NTS's knowledge, there are at least three mobile wireless providers in each of the referenced markets. None of these providers offers products comparable to traditional wireline telephone services to business or residential customers - such as DS-1/DS-3 service, PRI service, DID services, tie lines, hunting services, enhanced 911 services, or unlimited local calling within the exchange. Almost all of NTS's business customers and the vast majority of NTS's residential customers consider these functions to be required features.

⁵⁴ Estimate. See n.41, *supra*.

⁵⁵ Estimate. See n.42, *supra*.

⁵⁶ Estimate. See n.43, *supra*.

⁵⁷ In Odessa, Texas, NTS has heard that there is possibly a new cable company beginning to deploy hybrid fiber-coax cable television facilities. Those facilities are not widely deployed today.

Wireless providers in these markets offer no data options that are comparable to the broadband data services offered by the wireline providers.⁵⁸

The incumbent cable television operator in each market does offer high-speed internet access, but does not guarantee speeds and does not offer ubiquitous service throughout the exchange. Having originally built plant to serve primarily residential video customers, NTS understands that these incumbent cable operators are incapable of offering service to the vast majority of businesses due to the geographic placement of outside plant. None of the incumbent cable operators currently have price competition for video services except from national satellite providers – and, as a rule, the satellite providers do not provide local programming.

C. Small Markets – Plainview and Pampa, Texas

The Plainview, Texas market consists of roughly 18,000 access lines. The Pampa, Texas market has approximately 13,000 access lines. Both markets are quite rural, with somewhat developed business districts.⁵⁹ A single SBC end office serves each market.

In Plainview, NTS is physically collocated in the SBC Plainview end office. The NTS Lubbock switch serves as a remote switch for the Plainview exchange. Interconnection for the exchange of local traffic, network signaling and the like occurs via end office trunking at the SBC Plainview office. Interoffice transmission between the NTS Lubbock switch and the SBC Plainview office is accomplished using a single strand of SBC dark fiber provided as a UNE and a stand-alone SBC provided DS-3 UNE facility. NTS estimates that the cost to replace these connections, if they had to be constructed, would cost NTS approximately \$1,552,320.⁶⁰

⁵⁸ Typical mobile phone data services are limited to 28Kbs to 128Kbs transfer rates and these data plans are two to three times the cost of wireline options.

⁵⁹ Plainview is 45 miles from the nearest large metropolitan area (Lubbock). Pampa is 60 miles from the nearest large metropolitan area (Amarillo).

⁶⁰ Cost is estimated based on 21,120 feet of intracity construction at \$12.00 per foot and 216,480 feet of intercity rural construction at \$6.00 per foot.

Alternatively, under an OC-N tariff pricing scenario, this capacity would cost approximately \$12,000 per month.⁶¹ Under our existing interconnection agreement utilizing TELRIC pricing, this dark fiber facility costs NTS approximately \$2,500.00 per month to lease.⁶²

In Pampa, Texas, NTS is physically collocated in the SBC Pampa end office. The NTS Amarillo switch serves as a remote switch for the Pampa exchange. Interconnection for the exchange of local traffic, network signaling and the like occurs via end office trunking at the SBC Pampa office. Interoffice transmission between the NTS Amarillo switch and the SBC Pampa end office is accomplished using stand-alone SBC provided DS-3 UNE facilities. NTS estimates that the price tag to replace these connections, if they had to be constructed, would cost NTS approximately \$2,090,880.⁶³ Alternatively, under an OC-N tariff pricing scenario, this capacity would cost approximately \$15,000 per month.⁶⁴ Under our existing interconnection agreement utilizing TELRIC pricing, this capacity costs NTS approximately \$3,200 per month to lease.

While NTS is desirous of offering competitive video services in these small markets, this will not be possible using currently existing transmission capacity.⁶⁵ Additional capacity to markets of this size is simply not available unless it is constructed by NTS, and the costs to do so are prohibitive.

Alternative Providers - There is no other facilities-based competitive choice in either the Pampa or Plainview markets. SBC is the only available provider capable of delivering the

⁶¹ Cost is estimated based on calculations conducted by NTS prior to entry into this market using the current UNE configuration.

⁶² Cost is estimated based on TELRIC dark fiber pricing with a reference facility of 237,600 feet in length.

⁶³ Cost is estimated based on 31,680 feet of intracity construction at \$12.00 per foot and 285,120 feet of intercity rural construction at \$6.00 per foot.

⁶⁴ Cost is estimated based on calculations conducted by NTS prior to entry into this market using the current UNE configuration.

⁶⁵ It requires minimum capacity of OC-12 to transport NTS's switched digital IP video services.

network elements which NTS needs to use in these markets to provide quality dial tone products and advanced telecommunications capabilities to the public.

Intermodal Competitors – To NTS’s knowledge, there are at least two wireless providers in each of these markets. None of these providers offers products comparable to traditional wireline telephone services to business or residential customers - such as DS-1/DS-3 service, PRI service, DID services, hunting services, tie lines, enhanced 911 services, or unlimited local calling within the exchange. Almost all of NTS’s business customers and the vast majority of NTS’s residential customers consider these functions to be required features. NTS is not aware of whether or not the incumbent cable television operator in either market offers high-speed internet access. If so, NTS sales personnel have not come across such an offering in their sales efforts.

D. Facts All NTS Facilities-Based Markets Have In Common

Each collocation in NTS’s markets contains NTS owned Digital Loop Carriers (“DLC”), Digital Subscriber Line Access Multiplexers (“DSLAM”), appropriate fiber terminals, network monitoring and test equipment, and various peripheral equipment.

At each ILEC end office NTS interconnects its network with SBC UNE two-wire copper loops and four-wire hi-capacity loops to business and residential customers throughout these markets. NTS offers not only basic dial tone, but also services requiring hi-capacity loops such as Primary Rate Interface (“PRI”) lines and DS-1 service for both voice and data applications. As the Commission is aware, many (if not most) business customers require PRI or DS-1 lines in order to interface with their office Private Branch Exchanges (“PBX”). Voice features offered to the public include just about everything a Lucent Class 5 switch is capable of providing. NTS also offers enhanced voice mail products. Pricing for NTS voice services is typically fifteen to

twenty percent lower than that offered by the ILEC – substantially aiding the local economies where we deploy our services.

Also, at each end office, NTS interconnects its high-speed Digital Subscriber Line (“DSL”) customers to its network via NTS’s DSLAMs and associated equipment. NTS offers DSL standard broadband speeds that are as fast as line conditioning and length will allow. These speeds typically range from 600Kbs to in excess of 4Mbs. Significantly, in addition to “plain vanilla” ADSL, SDSL, and IDSL flavors, NTS has also deployed Reach DSL products that carry broadband services to customers up to thirty thousand feet from an end office. SBC offers no comparable service. Once established, DSL bit rates constitute guaranteed speeds to NTS’s customers. With the advent of ADSL2+ in the next few months, NTS’s data speeds will reach up to 24Mbs and, when they do, NTS plans to offer its existing 200-plus channel IP video programming to customers throughout its markets⁶⁶ – providing sorely needed competition to the existing incumbent cable operator. Currently, data services are used by NTS’s customers to accomplish a multitude of things including internet access, virtual private networking, peer-to-peer networking, enterprise voice over internet protocol using third party services, and telecommuting. In addition to DSL, NTS also offers 1.5Mbs and 45Mbs bi-directional data service to business customers throughout its facilities-based exchanges using SBC leased hi-capacity loops as UNEs.⁶⁷ Each NTS data service rides along the same interoffice facilities, and

⁶⁶ With the exception of the Pampa and Plainview markets, where sufficient long haul transport capacity does not exist to accommodate NTS’s video services.

⁶⁷ The key benefit to customers from this service, apart from bi-directional guaranteed bandwidth, is that it is not distance sensitive from the end office. This enables customers who cannot be reached by DSL services (and possibly cable modem service) to receive the benefits of advanced telecommunications capability.

in the case of ADSL and some DS-1/DS-3 applications, the same loop facilities as those used for voice services.⁶⁸

VI. THE IMPORTANCE OF INTEROFFICE DARK FIBER AS A UNE

Given the tens of millions of capital dollars already invested in its facilities-based markets by NTS and the millions of dollars being regularly paid to SBC for the lease of UNE's in these markets, it is important for the Commission to understand that if NTS is forced to replace its current interoffice TELRIC priced leased dark fiber facilities via either new construction or the lease of SBC OC-N tariff services, this would likely render market continuation financially untenable for NTS. Accordingly, if the Commission wishes to preserve and build upon facilities-based competition, it is imperative that TELRIC priced dark fiber interoffice facilities continue to be made available from the ILEC.

There seems to be a perception among some commentators that there exists a "fiber glut" in this country and that dark fiber facilities are available from a variety of providers to every point imaginable. While this is probably true with respect to long haul, or inter-city routes, it is by no means the case when it comes to connecting ILEC central office collocations together. In NTS's business plan, acting in reliance on rules promulgated by the Commission, the company has interconnected every available collocation utilizing ILEC dark fiber facilities; except in those situations where such facilities have been available for purchase from a third party or where it made sense to construct them itself. No third party offers dark fiber or OC-N connectivity between any of the NTS collocations connected using the dark fiber UNE. Thus, these facilities are only available directly from the ILEC.

⁶⁸ NTS finds this fact potentially significant to the Commission because NTS's current data, voice over data, and future video services are clearly an "advanced telecommunications capability" under the 1996 Act.

The use of dark fiber has enabled NTS to create self-healing SONET and/or Ethernet rings that ensure that NTS's customers receive the same quality of service as that offered by the ILEC. Moreover, the use of dark fiber has enabled NTS to strictly control the quality of services offered to its customers in the same manner that the ILEC can. Without this control, a facilities-based CLEC such as NTS would become much more dependant on the whims of its main competitor to ensure quality of service to its customers. For example, in the event of an outage affecting both ILEC and CLEC customers whose service rides the same fiber facilities, NTS's many years of experience strongly indicate to it that the ILEC would work to repair services to its own customers prior to repairing service for the CLEC. Such a scenario puts the CLEC at an incredible disadvantage in providing quality service to its customers.

Additionally, the use of dark fiber has allowed NTS begin to roll out video and other advanced data services to customers. Such advanced deployments would simply not be possible in the absence of TELRIC priced dark fiber facilities. Duplication of these facilities in NTS's UNE-L Markets would be entirely uneconomic and greatly decrease, or perhaps prevent, our ability to deliver competitive voice, data and video services to the public.⁶⁹

It has been suggested that it may be possible to replicate the functionality of the TELRIC priced dark fiber UNE with ILEC tariff-based special access services. These parties allege that the lack of access to a given TELRIC priced UNE (such as dark fiber between collocations) does not result in a finding of impairment where there is robust competition in a market.⁷⁰ The fact is, however, that with respect to dark fiber between NTS's collocations, such facilities are simply not available to be purchased under SBC's access tariffs in any of NTS's UNE-L Markets.

⁶⁹ As noted in Section V of these comments, NTS estimates that it would cost roughly \$6,072,948 to replicate these facilities.

⁷⁰ *USTA II*.

Moreover, not only is there a lack of robust competition with respect to these facilities, to the best of NTS's knowledge, SBC is the only entity which possesses dark fiber capable of linking NTS's various collocations together. If there was a non-SBC third party option available, the Commission can rest assured that NTS would be purchasing service from that party instead of SBC.

It may also be suggested that OC-N level services purchased under an access tariff are capable of linking collocations together and that this amounts to an acceptable substitute for TELRIC priced dark fiber facilities. This is simply not the case.

First, such a scenario is wholly uneconomic, creating even more barriers to entry than those that already exist. Secondly, such a scenario puts the CLEC in a more dependant relationship with the ILEC than is prudent because there is total reliance on the ILEC to maintain not only the fibers (a minimal task), but also maintain all electronics and almost all cross-connects and connectors. Based on NTS's years of experience, leaving this much control over service critical items in the hands of a CLEC's primary competitor places the CLEC in a situation of facing service interruptions that would not otherwise exist.⁷¹

Service interruptions using ILEC interoffice transport services are not an idle worry. For example, on September 28, 2004, the ILEC (SBC) which provides hi-capacity interoffice transport between NTS's Amarillo switch and NTS's collocation at the Diamond end office, disabled seven hi-capacity interoffice transport facilities leased by NTS to provide connectivity to our customers. This outage lasted three hours - during which time NTS's customers served

⁷¹ Due to the self-healing ring architecture which NTS has created (where possible) using SBC dark fiber, a fiber cut at any point on the fiber optic ring is not service affecting to any of NTS's customers. On the other hand, when using ILEC provided OC-N service (even with alleged ring OC-N service), a fiber cut in the wrong place, the slightest mistake by an ILEC technician, or ILEC equipment failure, is capable of disrupting service to tens of thousands of the CLEC's customers in one fell swoop. This simply presents too great a risk to a CLEC's customer base.

out of this end office were without local dial tone, data and other advanced services. There were literally hundreds of NTS customers that were without service during the outage.

Finally, the inability to purchase TELRIC priced ILEC interoffice dark fiber frustrates the purposes of the Telecommunications Act. The 1996 Act encourages facilities-based competition and investment in infrastructure (i.e....fiber optic transmission terminals and significant peripheral equipment). Without the dark fiber UNE, there would be no fibers to which such terminals could be utilized.⁷²

Facility based CLEC's need access to available ILEC dark fibers running between ILEC central offices at TELRIC pricing. As is the case with the dependency that exists between ILEC last mile loops, collocations, network signaling and the various other essential UNEs, access to these UNEs is meaningless without a reliable and cost effective method to interconnect these facilities back to the CLEC's core switching and data network. Interoffice dark fiber facilities are very rarely available from any third party other than the ILEC. Moreover, special access and or/or direct build proposals are entirely uneconomic solutions creating insurmountable barriers to entry.

VII. THE IMPORTANCE OF HI-CAPACITY LOOPS AND INTEROFFICE TRANSPORT AS A UNE

A. End Loops

NTS utilizes hi-capacity loops (DS-1 and DS-3) UNEs in order to service many customer needs. Specifically, it is an absolute necessity for the vast majority of business customers to interface their PBX equipment with either a PRI (which requires a T-1 UNE loop) or a DS-3. In the facilities-based markets that NTS serves, without access to these UNEs there is simply not an alternative method of providing dial tone on a competitive basis to this customer segment.

⁷² Section 706 of the Act encourages facilities investment to promote "advanced telecommunications capability."

Moreover, these facilities are used by many businesses to interface with the NTS data network and are used for a multitude of data applications. Without access to these facilities on a UNE basis, facilities-based CLECs would either (a) be frozen out of an entire market segment, or (b) be required to purchase such services under an access tariff at uneconomic pricing levels.

In the first instance, not being able to service small, medium and large business customers would simply make being a survivable CLEC impossible. As the Commission is aware, the business market segment is the most profitable portion of any facilities-based CLEC's operations. To a large measure these customers effectively subsidize a CLEC's ability to provide important voice, data and advanced telecommunications capabilities to the residential market segment. Thus, to exclude facilities-based CLECs from competing for an entire market segment would significantly impair a CLEC's ability to compete in all market segments.

At least in the facilities-based markets that NTS serves, as repeatedly noted in section V of these comments, there is simply not an alternative non-ILEC provider for these facilities. Without access to hi-capacity DS-1 and DS-3 end loops, NTS could not provide effective competition to the ILEC. As noted in Section II.E of these comments, intermodal competition is not ready to serve these customers. This leaves traditional wireline services as the only realistic method by which competition take place.

Additionally, today's necessary uses for these facilities do not take into account the need to use these facilities for tomorrow's as yet unforeseen applications. For example, NTS has plans to offer its IP video service to customers using not only ADSL2+, but where the this service cannot be supported due to distance limitations it will be necessary to utilize hi-capacity DS-1 and DS-3 loops for delivery to customers. Thus, eliminating their use as a UNE will frustrate CLECs' attempts to innovate for future applications. No one knows for sure what these

will be, but they are certain to arise and CLECs will be significantly impaired in their implementation without UNE access to these necessary network elements.

Second, just as access to hi-capacity DS-1 and DS-3 ILEC loops is required to service entire market segments, it is also critical to the future course of competition that these facilities be made available on a cost-basis TELRIC. No one can realistically assert that access to these facilities under an ILEC access tariff presents a cost-based alternative to a UNE at TELRIC pricing. Based on NTS's experience, the price differential between access based pricing and TELRIC based pricing represents about an eight to ten fold increase in the cost of these facilities. These costs cannot be passed on to customers because the ILEC will continue to have both the incentive and the wherewithal to price its retail service offerings below its access tariff offerings.

Access to a network element at a price that is so high that it precludes effective competition is to deny access altogether. The effective denial of access through a tariff based pricing scheme constitutes a gross impairment of CLEC's ability to compete. This was not the goal of the 1996 Act and the Commission must act to preserve a facilities-based CLECs ability to access hi-capacity loops at TELRIC pricing. It is the policy of the United States to encourage the development of advanced telecommunications capability to all Americans and hi-capacity end loops are one of the central means available in today's environment to ensure that this can continue to occur.⁷³

B. DS-1 and DS-3 Interoffice Transport

Hi-capacity DS-1 and DS-3 loops are also used extensively by facilities-based CLECs for interoffice transport. In those instances where a CLEC cannot economically justify OC-N level service, these UNEs are critical to the growth of facilities-based competition. Without them,

⁷³ 47 U.S.C. §157

other UNEs, such as collocations, loops, database access, and the like, become impossible to justify.

NTS uses these facilities to connect remote rural markets such as Pampa and Plainview, Texas. It also uses these facilities to connect to remote ILEC end offices such as the Diamond end office in Amarillo, Texas. These facilities are necessary because in remote or rural areas, cost-based hi-capacity interoffice transport facilities are the only economic method of delivering voice, data and advanced communications capability to customers who would otherwise not have a competitive choice for these services. The Commission should strive to implement policies that allow choice and the availability of new services to every American – not just those that live in the most urban areas. Hi-capacity interoffice DS-1 and DS-3 UNEs further this objective very well.

VIII. CONCLUSION

NTS has attempted by these comments to advise the Commission on matters that seem to be “on the table” in this proceeding and which are absolutely necessary to the successful operation of a facilities-based CLEC. Given the short comment period, NTS had to choose which critically necessary UNEs upon which to comment. There are many more that are just as critical, but NTS believes the Commission knows what they are and why they should be retained.

Respectfully submitted,

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Exhibit “A”

Overview of NTS’s Facilities-Based CLEC Business

NTS’s facilities-based CLEC operations are relatively unique within the industry and, therefore, NTS believes that this outline of NTS’s CLEC business model may be helpful to the Commission.

NTS is a facilities-based Competitive Local Exchange Carrier (“CLEC”) operating its own facilities in seven markets located in West Texas (the “UNE-L Markets”). These UNE-L Markets range in size from populations of approximately 12,000 to in excess of 200,000.¹ Today, after eight years of hard work, NTS serves in excess of 55,000 local access lines utilizing four Lucent 5ESS® switching centers. We also provide broadband data connectivity utilizing digital subscriber line (“DSL”) technology to in excess of 7,000 residential, small and large business customers. Our customer base ranges from the single line residential customer to hundreds of large mutli-line business customers; including numerous cities, school districts, and significant large businesses located in NTS’s UNE-L Markets.

NTS is collocated in twenty SBC central offices, at which collocation points NTS interconnects its network to the copper loops of SBC for the provision of both voice and broadband data applications.² Within each collocation NTS has placed its own fiber optic terminal equipment, digital loop carriers, DSLAMs, and associated peripheral equipment. Of supreme importance to the NTS model, where there is not an alternative provider for interconnectivity, NTS has leased dark fiber facilities between our collocations using SBC dark

¹ NTS’s smallest UNE-L market is Pampa, Texas and the largest single UNE-L market is Lubbock, Texas.

² NTS does not engage in “line splitting” or “line sharing” but, rather, leases the entirety of SBC’s copper loop to the customer premise for the provision of voice and data services.

fiber as an unbundled network element in order to create self-healing SONET and/or Ethernet rings as needed to ensure maximum quality of service to our customers.

Outside of our core UNE-L service area, NTS utilizes Total Service Resale (“TSR”) or Unbundled Network Element Platform (“UNE-P”) to service customers as an initial market entry approach. The particular method used to deliver service depends on a cost-benefit analysis of each customer’s needs versus costs incurred by NTS to pay for the capabilities necessary to offer the service.³

Having developed significant market penetrations in our UNE-L markets, NTS is now engaged in a process of developing ways to eliminate its reliance on SBC’s copper interoffice and “last mile” facilities. Currently, this effort involves the deployment of fiber-to-the-user in select areas in and around Lubbock, Texas.⁴ NTS’s efforts in this regard will depend, however, to a very great extent on the local competition rules promulgated by this Commission.⁵

³ For example, in an area where NTS cannot provision a customer request for service using its own facilities it will utilize the most cost effective method (TSR or UNE-P, but increasingly UNE-P) to provide a competitively priced service.

⁴ NTS has deployed an “all-IP”, 200-plus channel, switched digital video head end in order to add video services to its fiber-to-the-user customers and, eventually, to offer this video service option to our DSL customers utilizing ADSL2+ and ILEC hi-capacity loop facilities.

⁵ NTS has been forced to finance nearly all of its capital requirements with revenues from internally generated cash flows. This result obtains because the turmoil and regulatory uncertainty surrounding the continued availability of access to unbundled network elements at TELRIC pricing has made lenders and investors throughout the country risk-averse to loaning/investing capital to CLECs - even to a cash flow positive CLEC such as NTS. Without access to key network elements at TELRIC pricing, internally generated cash flows will dry up to the point that further expansion of facilities and service innovations will be impossible to achieve.

Exhibit "B"

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